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TITLES TO COAL LAND IN PENN. AND INCIDENTAL MONOPOLIES CONNECTED THEREWITH.

An interesting chapter in the study of the law and one which is possible to become more interesting, as a commercial factor in the United States, arises out of the ownership of coal, and titles relating to coal lands, and the alleged injurious monopoly created thereby in railroad corporations.

The ease in acquiring title to coal severed from the surface, in the form of leases, so-called, construed by the courts to be titles in fee, with no payment of money except by the ton as the coal was mined, or delivered in cars at the mouth of the tunnel or shaft, made investment in such property attractive both for corporations and individuals. It required no increase of capital on that account, and no payment of money until it was received. The increase of capital was in the preparation of the coal and delivery in the cars. In early times it resulted in a monopoly by the railroad interest and large individual operators by which, through judicious and strategic purchases of land, large bodies of land were controlled without purchase until the market or the will of the operator demanded.

In its early history the question of title was before the courts of Pennsylvania and received the careful consideration and judgment which all subsequent developments have justified. In all states of the Union where the common law and the laws of England regulated titles of land, prior to the Revolution, conveyancing had been reduced to an almost exact science in England. The formal deed with its artistically constructed parts controlled the construction thereof. But in the colonies and subsequent states the free spirit of America, with its popular ideas of government, communicated itself considerably to business transactions and other departments of society, and they were restive under forms of any kind, and wrote their contracts between themselves, with a freedom of will as well as a free hand. This may have arisen partly from the natural result of the condition of the colonists, living far from the shadow of a landed aristocracy which sought through law and forms, the perpetuation of wealth and real estate in the family with the right of primogeniture. The colonists came here, with few exceptions, more or less impoverished, valuing freedom of thought

and action above a bound conscience, and preferring a large family to a perpetual name secured by the injustice of the old-time heredity.

When it came to the matter of transfers of the interest in coal underlying the surface, which afforded a compensation, with the title to the farm untouched, the inartistic "agreement," or "lease," or "right to mine" or license, as it might have been thought of, arose with its doubtful significance and not infrequently hybrid character. The written instrument would call the consideration actually paid, "rent;" sometimes "royalty" or "price per ton." It would contain clauses of distraint, forfeitures for non-payment of rent, with right of entry and dispossession. The document grew in size, in an attempt to meet every future emergency, until it became a formidable instrument of many pages.

At an early day the attention of the courts was called to unravel the dubious character of the so-called leases for coal in the ground and separate from the surface and sub-soil, which remained in the grantor. The first case of importance came before the Supreme Court of Pennsylvania, and, fraught with difficulties, was so decided as to place forever a clear and distinct method of construction, and in its far-reaching results put the rights of coal land separated from the surface, on a permanent basis of value and title, with as full protection to the grantee as if he had a fee simple title in technical form. The case referred to is *Caldwell v. Fulton,* 31 Penna. State Reports 475, decided first in 1855. The questions came before the court and were reargued twice. Justice Woodward, who decided the first case, came from the coal regions. He was of a family famous in the law and on the bench, for sound learning, clear thought and wise forecast. The facts of that case are the following:

The action itself was trespass and it involved the title to the coal, the taking of which constituted the trespass. Caldwell, the ancestor of the plaintiff, was the owner of the *locus in quo.* In 1831 Caldwell conveyed to one Greer, sixteen acres, a tract lying on the Youghiogheny river; and "also, the full right, title and privilege of digging and taking away stone coal, to any extent the said Greer may think proper to do, or cause to be done, under any of the land now owned and occupied by the said Caldwell; provided, nevertheless, the entrance thereto, and the discharge therefrom be on the foregoing described premises" (the sixteen acres). The deed acknowledged a consideration of one thousand eight hundred dollars, describing by metes and bounds two tracts (the sixteen acres),

and then grants the coal in the terms above quoted. The habendum called the property conveyed "two lots or parcels of land" and the "aforesaid right to the stone coal," and is repeated in the covenant of warranty. Greer and wife subsequently conveyed an undivided half of the premises to one Case; Case to Bell; Greer also conveyed the other undivided half to McCune. Bell and McCune made partition according to agreed lines of the sixteen acres and the coal. McCune leased to Fulton in 1852, and it was the entry upon the coal under this lease for which suit was brought.

The court below was at a loss whether to denominate the grant of coal in Caldwell's deed to Greer, a common in gross, or appurtenant, or a license, but was clear that it was not an absolute grant of all the coal under plaintiff's land. The question also arose in the court above whether it was a corporeal or incorporeal hereditament. For, if it was incorporeal a division of it by the deed of Greer was not possible and extinguished the title in Greer, and his grantee. The court met all these questions, reviewing the English cases, and decided that it was a corporeal hereditament, and reversed the court below and construed the grant to be a fee simple.

On the second argument of the case in 1858, which was designed to review the case of 1855, Strong, Justice, enters again into the full discussion of the principles involved, and under the emphatic statement that "Coal and minerals in place are land" and therefore a corporeal hereditament, holds that the coal may be conveyed as such, and the title to the coal may be in one person, and to the surface in another, and each hold a fee simple. In England, owing to the doctrine or livery of seisin and the impossibility of making livery of coal below the surface, a difficulty arose in the minds of the judges, but in this country it was solved because the recording of the deed takes the place of livery.

A few quotations from the early discussion will make the trend of the American discussion clear. In the case cited under the agreement, Woodward, Judge, says: "A license it cannot be. The form of the conveyance excludes that. Because a mere license to enjoy a privilege in land is not an estate therein; it may be granted without deed, and even without writing, notwithstanding the statute of frauds. But here an estate or interest was evidently intended to be conveyed and it must have been either a corporeal or incorporeal hereditament. If incorporeal I agree it was not divisible. . . . An exclusive right to all the coal to be taken, without limitation except as to the point of ingress and egress, is a sale of the coal itself; and there is nothing incorporeal about coal. It is included in the defini-

tion of land." In the same decision of 1858, same case, Strong, J. (Yale 1828), says: "Coal and minerals in place are land. Nothing is more common in Pennsylvania than that the surface right should be in one man and the mineral right in another. . . . Both holders of a corporeal hereditament." Through a long line of decisions down to as late as *Sanderson v. Railroad Co.,* 109 Pa. St. 589, when the attempt was made by two arguments to shake the uniformity of the rule, the same rule of construction has been maintained in the following words: "When the parties omit to name a term, do not create a lease at will, nor a lease for life, though much of their contract is expressed in words familiar to a lease, the whole instrument must be taken into view to ascertain the intent."

Notwithstanding the clear reasoning and emphatic conclusiveness found in the case of *Caldwell v. Fulton,* the zeal of counsel for their clients in repeated instances endeavored to shake the minds of the judiciary from time to time by presenting nice distinctions. The only result was that, with the rule that the intention of the parties was always to govern in determining the *quantum* of estate, the court laid down the principle as a controlling guide to construction, that where the instrument of writing was a sale of *all* the coal, exclusive in the vendee, it became a severance of the coal from the surface, and vested an absolute title in the vendee. And these two facts were to be gathered from the whole instrument. All natural deductions follow this kind of title. Vendee is liable for taxes on the coal; he may control the space left for gangways to transport coal through it from other lands, at least until the time of exhaustion of his own lands; and all logical deductions characteristic of a fee simple title.

During the Civil War when the income tax was laid, the decision of the Commissioner of Internal Revenue, who was a lawyer and understood the Pennsylvania law as to coal, gave instructions that under such conveyances the royalty received was consideration money for the sale of land, and was not to be considered as income or rent, although called rent in the lease and payable by the ton mined.

Out of the development of the coal interest there naturally grew the interest which the railroads have taken in securing for themselves a permanent and continuous business for their roads, at an early time when freight was scarce, and railroad investments not attractive, and earnings were low. A little history is pertinent here.

In 1814 the Legislature of Pennsylvania granted a charter to the Lehigh Coal & Navigation Company to create a Slack Water Navi-

gation of the Lehigh river. This developed by legislation into a coal carrying company, ownership of coal lands and mining of coal and selling in the markets of the country. In 1824 a charter was granted to Maurice Wurts to improve the navigation of the Lackawaxen river, which subsequently emerged into the Delaware & Hudson Canal Company, a corporation of the state of New York, recognized by the state of Pennsylvania, authorized to hold coal lands, mine, sell and carry coal to market. This company connected the coal fields of the Northern Anthracite region with the Hudson river and New York city. This is an interesting fact, if any attempt is made to curb vested rights of public carrying companies and exclude them from transporting their own products to the markets of the several states of the Union. These were the beginnings of the railroad and other corporate interests in the Anthracite coal fields. It soon developed into a popular and legislative idea and expression that the interest of Pennsylvania was to encourage the development of the coal fields, both Anthracite and Bituminous, by granting charters to railroad and other public corporations, with the right to mine and sell coal in the markets. The railroads also found that the steady furnishing of an article becoming more and more a necessity for home comfort, and varied business and manufacturing interests, gave stability and strength to the freight traffic. In fact, some of the railroads were expressly built for this kind of freight, and between the desires of the people to promote industries on the line, and the inviting prospect presented to the railroads, some of them were lifted out of bankruptcy, and prosperity was widespread. The railroads in course of time controlled the traffic more or less, and a kind of monopoly was created, not so much against the purchasers and consumers of coal, as against the individual owners of coal land desirous of a market which they could not reach, and for which the railroads stood in their way. As a result of this state of affairs, when the Constitutional Convention of 1873 was called, one of the things sought was to break this monopoly. It was found by this Convention that this could not legally be done. The grants in the railroad charters had become vested rights of contract. In this dilemma a committee of the Convention called on officers of the railroad companies to ascertain if some plan could not be devised to secure the consent of the railroads to a modification of this vested right. Of course this could not be done. During one of the consultations the writer was present. It was suggested that the only method of breaking a vested monopoly was to make it general and open the same privileges to the general public.

Another evil to be remedied by the Convention was the great mass of special charters, which had been granted by and were sought at each session of the legislature. This was met by providing by general laws, for all classes of corporations, mining and railroads included. An examination of the Constitution of 1873 of Pennsylvania shows that while it provided that "no" (future) "incorporated company doing the business of a common carrier shall engage in mining or manufacturing articles for transportation over its works," nevertheless it did provide that "any mining or manufacturing company may carry the products of its mines or manufactories on its railroad or canal, not exceeding fifty miles in length." These provisions, as subsequent events show, relieved the owners of lands to a great extent, if not entirely from the monopoly which existed against them.

It is interesting to study the result of this legislation in the growth and prosperity of the state. It is not presumed that it is all due to the breaking of this one kind of monopoly, and it is only suggested as a possible clue to the breaking of other monopolies intrenched under vested rights so as to rob them of much, if not all their evils. In the year 1870 (census) the amount of

Bituminous coal marketed in Pennsylvania was.....	7,798,517 tons
Anthracite coal marketed was.....	15,650,275 tons
1905 the Bituminous coal marketed was.....	119,361,514 tons
1905 Anthracite coal marketed was.....	78,647,020 tons

In each decade since 1870 the population of Pennsylvania has increased about one million. It is not claimed that these statistics are anything more than to illustrate a factor which largely relieved in its outcome the monopoly complained of in 1870. As early as 1839 Jessup, P. J. (Yale 1815) decided that the lateral railroad act of 1832 which authorized the building of a railroad with right of eminent domain, using private property for a private use, in order to connect individual mines with public transportation companies, was constitutional. One of the grounds for this decision is "that the mining of coal was of public interest." The judgment of the lower court was affirmed by the Supreme Court in the following words of Gibson, C. J.: "Pennsylvania has an incalculable interest in her coal mines; nor will it be alleged that the incorporation of railroad companies for the development of her resources, in this or any other particular would not be a measure of public utility." For cases in other states approving of this decision see Am. Dec., Volume 36, page 144.

A new question is now arising and demanding public attention,

and in one of its aspects it is germane to the subject we have been treating, viz., the monopoly in the coal trade itself, in connection with another evil of discrimination in rates of freight. It is not presented as a clear-cut and single issue and is therefore not free from difficulties which otherwise would be more easy of solution. Unfortunately the prosperity of the country for many years, and the haste to be suddenly rich, have led not one class of corporations, but different classes, to enter upon a method of business unjustified even by a desire of increased and legitimate profits. It has created a frenzy almost as bad as "frenzied finance," and rests in the public mind with no clear apprehension as to the wise method to take to remedy it. The real thing to be reached is almost entirely monopolistic injustice in all kinds of corporate management. Rascality can always be legally reached in this country in the long run, and is as widely different from a monopoly which has become a "vested *right*," under the meaning of the Constitution of state and national laws, as a legal right is from an absolute wrong. The serious question proper for cautious consideration, difficult as it is, is that which is raised by the suggestion that no common carrier shall be allowed to carry as freight its own goods and products, and this to take the form of legislation by the national government, reaching to the past as well as the future. It is proposed to reach this through the power given to the United States to "regulate commerce," and deprive railroads of all vested rights to carry their own products, outside of the state of their incorporation. It is possible, unfortunately, that it may become a political question. It certainly is a legal one. It is not the purpose of this article to give a legal opinion in the matter. It may be asserted, however, that under the Dartmouth College case the result sought by retroaction cannot be reached without a legal struggle as famous as that case, with a possible unhinging of principles as sacred as they are useful, settled by that case. The question is not merely legal; it is to a certain extent social, and possibly revolutionary. Notwithstanding all that may be said of the evils which have existed in connection with corporate action in this respect, it has not been an unmixed evil. Principles of constitutional and fundamental law well considered, under which safety and prosperity have arisen, must appeal to the legal mind to offer a word of caution. The question also has another aspect than a legal one, viz., whether any success in destroying a vested right in public corporations to sell their product in any market does not introduce an evil. The owner of the coal now sells it, as sometimes the farmer, his product to the carrying company at his own door.

He is not obliged to seek his customer, nor his pay in Montreal or New Orleans. The purchaser in New Orleans is not obliged to seek Pennsylvania for his purchase. Also, does the Constitutional question to regulate commerce between the states mean to destroy it in any sense, as it has arisen through the century under legislative purpose to promote the welfare and mutual prosperity between the states. This subject is germane to the matter treated in the first part of this article, because it was through the settlement of the titles through judicial action on a distinct and permanent basis that the railroads under legislative sanction acquired any monopoly in that product. Their contracts are unique and beneficial to both parties. Whatever evils exist to-day in corporate action which has resulted in the "Trusts" and the stifling of competition, in rebates and reduction of price to favored customers, are not due to the fact that transportation companies own their transported product. Even if it were, it is competent, by the scientific methods of modern individual business to ascertain the facts and learn the exact normal market price of any product and its freight charge. Under the outcome of the Coal Commission what do we have,—brought about by the initiative of the executive? We have one man ascertaining to a cent the average market value of coal at tidewater and exactly regulating the price up or down to be paid as the wages of the miner. In this view there can be no question in regard to the government having the legal and practical power, under regulating commerce, to regulate freight rates, and prevent rebates under a false price for coal which is not the market price. This can be done outside of politics, and within the realm of commercial exactitude and under proper regulations of control through the department of commerce and labor. Why, under the power to regulate commerce, should the Constitution be strained to unbalance business methods which have grown up, bringing prosperity and convenience to the whole country and in a direction that violates the sanctity of contracts and unsettles business, when the same goal may be reached by a wiser course? The simple fact that some corporations have a right to carry their own product to market, which has become vested, is not the evil,—if it be an evil,—that society is aiming at. The evil to-day is graft, discrimination, rebates to hide discrimination. The investigation already made shows it did not hide discrimination, and the law can correct that, without violating or altering the Constitution under one of the most sacred principles, the inviolability of contracts by state or national legislation. A careful study at this day of the Dartmouth College case is worth the

effort. The sound principles there enunciated and their far-reaching influence on all the varied commercial and corporate interests of the country, as well as those interests which concern individual safety and property rights, cannot be ignored.

The writer has no personal interest in this question other than any other citizen. He has taken no brief on the subject—is not interested as a stockholder, or officer or counsel in that line. The wisdom of the wisest it is deemed is able to reach a solution that will bring no dangerous collision of classes on the subject, or jeopardize settled lines of business and prosperity. *Alfred Hand,*

Justice of Supreme Court of Penn.